No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS AND UTILITY WATER ACT GROUP AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ANDREW J. TURNER
KARMA B. BROWN
KRISTY A. N. BULLEIT
Of Counsel
UTILITY WATER ACT GROUP
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
(202) 955-1500

VIRGINIA S. ALBRECHT
Counsel of Record
DEIDRE G. DUNCAN
BRIAN R. LEVEY
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
valbrecht@hunton.com
(202) 955-1500

March 2, 2016

Counsel for Amici Curiae

QUESTION PRESENTED

Whether an approved jurisdictional determination ("AJD") finalized through the United States Army Corps of Engineers ("USACE" or "the Corps") administrative appeals process, 33 C.F.R. Part 331, constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and is therefore subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq*.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

BACKGROUND:

WHAT APPROVED JURISDICTIONAL DETERMINATIONS ARE AND WHY THEY ARE IMPORTANT. 4

ARGUMENT 15

I. Approved Jurisdictional Determinations Are Final Agency Action Under the Administrative Procedure Act 16

A. Agency Action Is Final If It Is Definitive and Has a Direct, Immediate, and Practical Impact 18

B. Approved Jurisdictional Determinations Have the Requisite Effects to Be Final Agency Action. 22

II. There Is No Other Adequate Remedy in a Court for Approved Jurisdictional Determinations. 30

A. Judicial Review of a Permit Is Not an Adequate Remedy for an Unlawful Approved Jurisdictional Determination. 31

B. Judicial Review in the Context of an Enforcement Action Is Not an Adequate Remedy for an Unlawful Approved Jurisdictional Determination. 35

CONCLUSION 39

APPENDIX 1a

Declaration of Professor David L. Sunding, Ph.D. 1a

TABLE OF AUTHORITIES

Page

Federal Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967).. *passim*

Belle Co., L.L.C. v. *U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014).....18

Bennett v. *Spear*, 520 U.S. 154 (1997).....17, 20

Borden Ranch P'ship v. *U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002).....27

Columbia Broad. Sys., Inc. v. *United States*, 316 U.S. 407 (1942).....19

Duarte Nursery, Inc. v. *U.S. Army Corps of Eng'rs*, 17 F. Supp. 3d 1013 (E.D. Cal. 2014).....10, ...36

Ex parte Young, 209 U.S. 123 (1908).....37

Fairbanks N. Star Borough v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008).....18

Frozen Food Express v. *United States*, 351 U.S. 40 (1956).....17, 18, 19

FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980).....17

Hanson v. *United States*, 710 F Supp. 1105 (E.D. Tex. 1989).....28

Harrison v. *PPG Indus., Inc.*, 446 U.S. 578 (1980).....21

Hawkes Co. v. *U.S. Army Corps of Eng'rs*, 782 F.3d 994 (8th Cir.), *cert. granted*, 136 S. Ct. 615 (2015) 9

In re EPA & Dep't of Def., 803 F.3d 804 (6th Cir. 2015) 8

Nat'l Ass'n of Home Builders v. *U.S. Army Corps of Eng'rs*, 417 F.3d 1272 (D.C. Cir. 2005) 28, 29

Nat. Res. Def. Council, Inc. v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975) 7

Port of Bos. Marine Terminal Ass'n v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) 21

Rapanos v. *United States*, 547 U.S. 715 (2006) ..... 7, ... 33, 34

Sackett v. *EPA*, 132 S. Ct. 1367 (2012) ..... 5, 17, ... 21, 37, 38

Solid Waste Agency of N. Cook Cnty. v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) 7

Tabb Lakes, Ltd. v. *United States*, 715 F Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) 7

United States v. *Ellen*, 961 F.2d 462 (4th Cir. 1992) 27

United States v. *Feinstein Family P'ship*, No. 96-232-CIV-FTM-24(D), 1998 U.S. Dist. LEXIS 23963 (M.D. Fla. Oct. 28, 1998) 27, 28

United States v. *Key West Towers, Inc.*, 720 F Supp. 963 (S.D. Fla. 1989) 28

United States v. *Lipar*, No. H-10-1904, 2015 U.S. Dist. LEXIS 115821 (S.D. Tex. Aug. 30, 2015), *appeal docketed*, No. 15-20625 (5th Cir. Oct. 29, 2015) 9, 10

United States v. *Pozsgai*, 999 F.2d 719 (3d Cir. 1993) 27

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 5

United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) 7

State Cases:

Bergen Cnty. Assocs. v. *Borough of E. Rutherford*, 12 N.J. Tax 399 (N.J. Tax Ct. 1992) 25

Deerfield Plantation Phase II B Prop. Owners Ass'n v. *S.C. Dep't of Health & Envtl. Control*, 777 S.E. 2d 817 (S.C. 2015) 26

Dep't of Transp. v. *La Salle Nat'l Bank*, 623 N.E.2d 390 (Ill. App. Ct. 1993) 32

Federal Statutes:

5 U.S.C. § 704 ..... 3, 15, 30

33 U.S.C. § 1311 4

33 U.S.C. § 1319(a) 4, 21, 27

33 U.S.C. § 1319(c) 27

33 U.S.C. § 1319(c)(2) 4, 27

33 U.S.C. § 1319(g)(2)(B) 4

33 U.S.C. § 1344 4

33 U.S.C. § 1344(e) 28

33 U.S.C. § 1362(7) 4

State Statutes:

LA. REV. STAT. ANN. § 9:3198(A)(1) (2013) 25, 26

Legislative History:

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division D, Title I, 129 Stat. 2242 (2015) 11

S. Rep. No. 752 (1945) 39

Federal Regulations:

17 C.F.R. § 229.103(5) 25

33 C.F.R. § 320.1(a)(6) 11

33 C.F.R. § 320.4(r)(2) 29

33 C.F.R. § 326.3(c) 4

33 C.F.R. § 331.2 ..... 11, 14

33 C.F.R. Part 331 34

33 C.F.R. Part 331, Appendix A 30, 32

33 C.F.R. Part 331, Appendix C 11, 30, 32

33 C.F.R. Part 325 32

40 C.F.R. § 122.26(b)(8) 8

40 C.F.R. §§ 230.10, *et seq.* 15

State and Local Regulations and Forms:

Beaufort, S.C., Unified Development Ordinance, App. (revised Sept. 14, 2012) 26

City of Charleston, S.C., Subdivision Concept Plan Submittal Checklist 26

Horry County, S.C., Code of Ordinances, ch. 18, art. 2, §§ 3-4(C), 4-1(2015) 26

Louisiana Property Disclosure Document for Residential Real Estate (Rev. 02/01/15) 25

South Carolina Dep't of Health & Envtl. Control, National Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activities, § 2.6.2 (2013) 26

Federal Register:

65 Fed. Reg. 12,818 (Mar. 9, 2000) 28

78 Fed. Reg. 66,643 (Nov. 6, 2013) 4

80 Fed. Reg. 37,054 (June 29, 2015) 8, 9

Court Materials:

Duarte Nursery, Inc. v. *U.S. Army Corps of Eng'rs*, 17 F. Supp. 3d 1013 (E.D. Cal. 2014) (No. 2:13-cv-2095-KJM-AC)

- Complaint (Oct. 10, 2013) 10
- Mem. of Points & Authorities in Supp. of Fed. Def.'s' Mot. to Dismiss Compl. (Dec. 23, 2013) 36

Sackett v. *EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062)

- Transcript of Oral Argument (Jan. 9, 2012) 16, 27, 31, 39

Miscellaneous:

Abcarian, Robin, *This case is enough to furrow a farmer's brow*, LOS ANGELES TIMES, Jan. 15, 2016 36

Federal Storm Water Association Comments on Proposed Definition of "Waters of the United States," (Nov. 14, 2014), EPA-HQ-OW-2011-0880-15161 8

Jacobs, Jeremy P., *Concrete-lined river seen as regulatory quagmire for EPA*, E&E GREENWIRE, Feb. 1, 2016 8

Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989) 11, 32

Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army, Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990) 15

Mersel, Matthew K., U.S. Army Corps of Engineers, *Development of National OHWM Delineation Technical Guidance* (Mar. 4, 2014).... 6, 7

Newport Banning Ranch, Draft Envtl. Impact Report (Sept. 9, 2011) 26, 27

Questions and Answers on RGL 08-02 26

Sunding, David & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59 (2002) 33

U.S. Army Corps of Engineers, Civil Works Budget and Performance, Budget Strong-Point FY 2016, Regulatory (Feb. 2, 2015) 11

U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007) 12

U.S. Army Corps of Engineers, ORM Jurisdictional Determinations and Permit Decisions, http://corpsmapu.usace.army.mil/cm_apex/f?p=340:11:0::NO 12

U.S. Army Corps of Engineers, ERDC/EL TR-10-16, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region (Version 2.0)*, (Aug. 2010) 5, 6

U.S. Army Corps of Engineers, ERDC/EL TR-12-1, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region (Version 2.0)*, (Jan. 2012) 6

U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008) ..... 10, 11, ... 14, 22, 32

U.S. Army Corps of Engineers, South Atlantic Division, Table of Appeals, http://www.sad.usace.army.mil/Missions/Regulatory/RegulatoryAppeals/TableofAppeals.aspx 35

U.S. EPA & U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 20, 2015), EPA-HQ-OW-2011-0880-20866 29

U.S. General Accounting Office, GAO-04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* (Feb. 2004) 6

Wakeley, James S., U.S. Army Engineer Research & Development Center, ERDC/EL TR-02-20, *Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations* (Aug. 2002) 6

INTERESTS OF *AMICI CURIAE*

Amici represent a broad cross-section of public and private sector entities subject to Clean Water Act ("CWA" or "the Act") regulation.[1] *Amici* frequently need AJDs from the Corps, and in this brief detail how AJDs directly affect choices they and others must make about their operations.

The Foundation for Environmental and Economic Progress ("FEEP") is a national coalition of landholding companies formed in 1989 to address federal environmental policies that affect the use of land and water. Its members are planned community developers, and companies engaged in forestry, mining, and agriculture. Foundation members own land in 44 states, and are deeply committed to environmental stewardship of their property.

The Utility Water Act Group ("UWAG") is a voluntary, ad hoc, non-profit, unincorporated group of 210 individual energy companies which own and operate over fifty percent of the nation's electric generating capacity, and three national trade associations which represent investor-owned utilities, publicly-owned utilities, and non-profit rural cooperatives. Supplying electricity throughout the country requires the construction and maintenance of electric generation facilities, substations, and thousands of

---

[1] Pursuant to Rule 37.6 of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

miles of transmission and distribution lines and associated access roads, which must sometimes abut, rely on, or cross wetlands and other "waters of the United States." The administration of the CWA section 404 regulatory program, insofar as it affects the electric utility industry, is important not only to UWAG members but also to the public at large, whose health, safety and general welfare depend on the reliable delivery of electricity.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The public cannot identify what lands and waters constitute "waters of the United States" subject to CWA regulation. So the Corps has established a formal process to investigate a particular piece of property and then prepare an AJD that depicts in great detail – inches not acres – the boundaries of "waters of the United States." AJDs are explicitly "binding" on the Corps and the U.S. Environmental Protection Agency ("EPA") and will represent the government's position in subsequent litigation. Recipients use AJDs to plan the use of property, often in an effort to avoid or minimize impacts to "waters of the United States," and thereby avert or limit labyrinthine CWA permit procedures. AJDs are also relied upon in real property transactions, to establish value for tax and lending purposes, and by state and local governments to determine compliance with their own regulatory programs. Equally important,

AJDs expose recipients to enhanced penalties if the government initiates enforcement. Yet, if an AJD wrongly asserts CWA jurisdiction, what "remedy in a court" is adequate other than immediate review of the AJD? None.

APA Section 704 provides for judicial review of all final agency actions for which there is no other adequate remedy in a court. 5 U.S.C. § 704. The government argues AJDs are not judicially reviewable because they do not *direct* recipients to take any particular action. But AJDs establish sharp lines that have direct, powerful, and coercive effects on how their recipients proceed. Further, the government's proposed remedies – (1) first applying for a permit and then suing to prove no permit is needed, or (2) triggering an enforcement action by filling areas deemed jurisdictional and then litigating jurisdiction as a defense to the enforcement action – are nonsensical, time-consuming, and very costly. Certainly they are not adequate.

The government – as it has shown over the years – is prone to expansive jurisdictional claims. Congress enacted the judicial review provisions of the APA to provide a check on administrative extravagance. As a matter of sound statutory interpretation, sensible CWA policy, and fundamental fairness to citizens, the Court should hold that AJDs are subject to judicial review.

BACKGROUND: WHAT APPROVED JURISDICTIONAL DETERMINATIONS ARE AND WHY THEY ARE IMPORTANT.

The CWA is a strict liability statute that prohibits the "discharge" of any pollutant into "navigable waters" except in compliance with a permit issued under the Act. 33 U.S.C. § 1311. Section 404 authorizes the Corps to issue permits for the "discharge of dredged or fill material," including certain earth-moving activities such as the peat mining proposed in the case at bar. 33 U.S.C. § 1344.[2] The term "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Violators of the Act are subject to civil penalties up to $37,500 per day, per violation, 78 Fed. Reg. 66,643, 66,647 (Nov. 6, 2013), and imprisonment for up to three years, 33 U.S.C. § 1319(c)(2), or both. EPA and the Corps also have powerful administrative enforcement tools such as compliance orders, notices of violation, and cease-and-desist orders, 33 U.S.C. § 1319(a); 33 C.F.R. § 326.3(c), and can assess administrative penalties up to $187,500. 78 Fed. Reg. at 66,647 (citing 33 U.S.C. § 1319(g)(2)(B)).

Accordingly, entities conducting any kind of activity on the landscape must tread lightly, taking care to identify any areas that may be deemed "navigable waters" and either avoiding such areas or obtaining a permit if they plan to discharge to them. The prob-

---

[2] The CWA Section 404 permit program is administered jointly by the Corps and EPA.

lem is that in many cases it is very difficult to determine whether land contains "navigable waters," and if it does, the boundaries of those waters.[3] Identifying "navigable waters" involves a two-part inquiry – (1) whether the area in question meets the *physical* criteria to be a wetland or nonwetland water (*e.g.*, a tributary) within the meaning of applicable regulations, guidance, and policy, and (2) whether the wetland or nonwetland water meets the *legal* criteria to be "navigable waters."

Of course, a landowner who finds herself knee-deep in a swamp should be expected to surmise she may be in an area deemed a wetland subject to Corps regulation. But where does the wetland end? As this Court has noted, "[T]he transition from water to solid ground is not necessarily or even typically an abrupt one [w]here on [the] continuum to find the limit of 'waters' is far from obvious." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

Physical Uncertainty. Importantly, many areas that do qualify as "wetlands" under federal guidance are not at all like swamps. Under Corps guidance, an area may be deemed a "wetland" even if it is never wet at the surface. The underground water table need only rise to within 12 inches of the surface for a few days each year.[4] Thus, it is not surprising

---

[3] "The reach of the Clean Water Act is notoriously unclear." *Sackett* v. *EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

[4] See, *e.g.*, USACE, ERDC/EL TR-10-16, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest*

that many people have no idea portions of their backyard qualify as wetlands. The Corps knows this is a problem. James S. Wakeley, USACE, ERDC/EL TR-02-20, *Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations*, 13 (Aug. 2002) (wetland conditions "may not be directly observable in the field and may require long-term study or specialized training and equipment to evaluate [] a particular site.").

Nonwetland waters – such as the dry washes, arroyos and coulees that criss-cross desert landscapes – are similarly challenging. The Corps uses the "Ordinary High Water Mark" ("OHWM") to identify such linear features, but there is no consistent method for recognizing the OHWM. One Corps official told the then U.S. General Accounting Office "that if he asked three different district staff to make a jurisdictional determination, he would probably get three different assessments of the ordinary high water mark." U.S. Gen. Accounting Office, GAO-04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, 22 (Feb. 2004). The problem persists to this day. See Matthew K. Mersel, USACE, *Development of Na-*

Region (Version 2.0), 75 (Aug. 2010); USACE, ERDC/EL TR-12-1, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region (Version 2.0)*, 85 (Jan. 2012). In the interest of brevity, the hyperlinks to the websites for the Regional Supplements, and other sources in this brief, have not been included since many documents are easily obtainable via internet search engine.

tional OHWM Delineation Technical Guidance, slide 3 (Mar. 4, 2014) ("vague definition" leads to "[i]nconsistent interpretations of OHWM concept" which leads to "[i]nconsistent field indicators and delineation practices").

Legal Uncertainty. Even if the land in question has the physical characteristics of wetlands or non-wetland waters, significant uncertainty exists whether the property meets the legal criteria to be CWA "navigable waters." The reach of the CWA has been controversial since the statute was enacted in 1972.[5] The Court's most recent CWA jurisdictional cases rejected the agencies' expansive jurisdictional theories. *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*") (Corps jurisdictional claim over remote ponds impinges on States' traditional land and water authority contrary to explicit CWA language); *Rapanos* v. *United States*, 547 U.S. 715 (2006) (rejecting jurisdiction over "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States,'" *id.* at 742 (plurality op.); rejecting Corps standard that "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it ," *id.* at 781 (Kennedy, J., concurring)).

---

[5] See, *e.g.*, *Nat. Res. Def. Council, Inc.* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975); *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989); *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997).

Earlier this year, the agencies promulgated a new rule announcing a new theory of jurisdiction that would recapture many areas this Court said were out of bounds in *SWANCC* and *Rapanos*. Dep't of the Army, Corps of Eng'rs & EPA, Clean Water Rule: Definition of "Waters of the United States," Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015) ("WOTUS Rule"). That rule has been stayed by court order,[6] but if it ever takes effect, it will only compound the confusion.

The rule defines "tributary" to mean "a water that contributes flow" and has the physical indicators of bed, banks, and OHWM – a definition so broad that some have read it to capture municipal stormwater conveyances ("MS4s"), which consist of a network of "drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains." 40 C.F.R. § 122.26(b)(8). If the storm sewers are "waters of the United States," then the government would have the authority to regulate discharges *to* sewer systems (in addition to discharges *from* them).[7] While the rule expressly excludes

---

[6] *In re EPA & Dep't of Def.*, 803 F.3d 804 (6th Cir. 2015).

[7] Jeremy P. Jacobs, *Concrete-lined river seen as regulatory quagmire for EPA*, E&E GREENWIRE, Feb. 1, 2016, at 4 ("[I]t's unclear whether all of the countless creeks, channels, and other stormwater conveyances stemming from the [Los Angeles] [R]iver that are almost always bone dry would qualify [as waters of the United States]."); see also Federal StormWater Association Comments on Proposed Definition of "Waters of the United States," at 10 (Nov. 14, 2014), EPA-HQ-OW-2011-0880-15161 ("the overly broad definition of 'tributary' may im-

stormwater control features "created in dry land," 80 Fed. Reg. at 37,105, the term "dry land" has not been defined.

Another new jurisdictional category in the WOTUS Rule ("adjacent waters") appears to reach many industrial basins, process water ponds, and other water features common in industrial operations. These features bear no resemblance to the navigable waters that Congress intended the CWA to protect. But if they are "waters of the United States," routine operation, maintenance, and repair at these facilities will require permits. Thus, it is critical to determine whether such areas are jurisdictional.

In light of these uncertainties, a layperson cannot confidently identify "waters of the United States" by herself. While "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property," *Hawkes Co.* v. *United States Army Corps of Engineers*, 782 F.3d 994, 1003 (8th Cir.) (Kelly, J., concurring), *cert. granted*, 136 S. Ct. 615 (2015), the CWA is an exception. Even hiring an expert will not provide comfort because the Corps (or EPA) may not agree with the expert, and the agencies' regulations interpreting jurisdictional waters are so expansive and vague as to invite such disagreements. In *United States* v. *Lipar*, for example, the landowner began development in an area a consultant had identified as nonjurisdictional. No. H-

---

properly treat MS4s not as conveyance systems but as jurisdictional waters.").

10-1904, 2015 U.S. Dist. LEXIS 115821, at *2-3 (S.D. Tex. Aug. 30, 2015), *appeal docketed*, No. 15-20625 (5th Cir. Oct. 29, 2015). EPA, however, disagreed, and brought an enforcement action. *Id.* at *11. After five years of litigation, the district court determined that the area was not jurisdictional. *Id.* at *13.[8] *Amici* are aware of numerous similar situations in which a landowner relied in good faith on an expert's report to avoid jurisdictional waters by staying within areas the consultant had concluded were not "waters of the United States," only to face an enforcement action claiming the areas in question were in the agency's view jurisdictional.

AJDs Dispel Uncertainty. Accordingly, the only way a person can be confident the Corps and EPA will not question a jurisdictional determination on a given piece of property is to ask the Corps to issue an AJD. An AJD is a "definitive, official determination that there are, or that there are not jurisdictional 'waters of the United States' on a site." USACE, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations, at 5 (June 26, 2008) ("RGL 08-02"). It "precisely identifies the limits of those waters [and] can be relied upon by a landowner, permit applicant, or other 'affected party' for five years." *Id.* at 1, 2.[9] An AJD may be requested by a landown-

---

[8] See also Compl. ¶ 46, *Duarte Nursery, Inc.* v. *U.S. Army Corps of Eng'rs*, 17 F. Supp. 3d 1013 (E.D. Cal. 2014) (No. 2:13-cv-02095-KJM-AC).

[9] In "extraordinary circumstances, such as an [AJD] based on incorrect data provided by a landowner or consultant," an AJD may be revised. RGL 08-02 at 2.

er, permit applicant or other "affected party"[10] and once issued is "binding on the Government and represent[s] the Government's position in any subsequent federal action or litigation regarding the case."[11] In particular it "can be used and relied on if a CWA citizen's lawsuit is brought challenging the legitimacy of that JD or its determinations." RGL 08-02 at 2. AJDs are "final agency action" under the Corps's regulations, 33 C.F.R. § 320.1(a)(6), and may be appealed through the Corps's administrative appeals process, 33 C.F.R. Part 331, Appendix C, as was the AJD in this case.

For Fiscal Year 2016, Congress appropriated $200 million to make sure the Corps has the resources necessary to make these detailed determinations.[12] In preparing an AJD, the Corps conducts an extensive investigation of the chemical, biological, hydrological and landscape characteristics of the site in

---

[10] "Affected party" means "a permit applicant, landowner, a lease, easement or option holder (*i.e.*, an individual who has an identifiable and substantial legal interest in the property) .." 33 C.F.R. § 331.2.

[11] Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act at 1 (Jan. 19, 1989) ("1989 MOA").

[12] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division D, Title I, 129 Stat. 2242, 2399 (2015). These monies will support the completion of "136,000 final actions," approximately 56,000 of which are jurisdictional determinations. USACE, Civil Works Budget and Performance, Budget StrongPoint FY 2016, Regulatory (Feb. 2, 2015).

question. The site work is carried out in accordance with a 60-page "Jurisdictional Determination Form Instructional Guidebook," recorded on a seven-page "Approved Jurisdictional Determination Form," and posted to a public website. USACE, ORM Jurisdictional Determinations and Permit Decisions, http://corpsmapu.usace.army.mil/cm_apex/f?p=340:11:0::NO.

For example, on one 6,500-acre site depicted in Exhibit 1 below, the Corps determined there were 1,458 acres of "waters of the United States" scattered among 165 discrete wetland polygons ranging in size from 0.03 acre to 354.7 acres.

Exhibit 1

Another jurisdictional determination – on an 1,800-acre site in Arizona – claimed jurisdiction over 43 discrete drainages, ranging in depth from half an inch to 45.8 inches, in width from 3 to 50 feet, and in length from 100 to 9,160 feet. Determinations on smaller properties are similarly detailed. A property in Virginia, 66 acres in size, contained 16 discrete wetland areas totaling 28 acres, the smallest being 0.003 acre or 150 square feet. In short, an AJD is a highly detailed, site-specific depiction of CWA jurisdiction on a given property.

For those who can make do with less precision, the Corps offers a Preliminary Jurisdictional Determination ("PJD"). PJDs are "written indications that there *may* be waters of the United States [including wetlands] on a parcel or indications of the *approximate* location(s) of waters of the United States .." 33 C.F.R. § 331.2 (emphases added). In contrast to an AJD, a PJD is "advisory in nature," *id.*, "non-binding," and cannot be appealed. RGL 08-02 at 3.

People choose AJDs over PJDs when they want to be sure they can rely on the precise lines the Corps has drawn. They may want to establish the value of the land for tax purposes or perhaps in connection with the conveyance of the property. They may be evaluating options for future uses of the property, or designing a site plan for immediate development. The AJD provides certainty where previously the existence, extent, and location of CWA jurisdiction was uncertain. Accordingly, the AJD becomes the basis for the choices the landowner, operator, lender, local

regulator or other "affected party" makes about the property.

In this way, the AJD is a key instrument advancing the overarching policy of the Section 404 program, *viz*: to avoid impacts to jurisdictional features whenever possible.[13] By telling the landowner where jurisdictional features lie, the AJD allows a project proponent to avoid or minimize adverse impacts. In the best case, the site development plan can avoid all adverse impacts, which means the project proponent does not have to pursue a permit, and the Corps does not have to process an application. A public policy trifecta: important aquatic features are saved, the developer is spared the time and expense of the permit process, and the Corps's workload is reduced.

ARGUMENT

Pursuant to the APA, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. Like agency action previously held to be reviewable under the APA by this Court, AJDs have immediate and substantial consequences for the recipient and if incorrect, need to be set aside promptly by the Judicial Branch. Yet the government persists in arguing that an AJD is not final, and that APA review is barred because the "affected party" has two other "ade-

---

[13] Memorandum of Agreement Between the EPA & the Dep't of the Army, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, at 2 (Feb. 6, 1990); see also 40 C.F.R. §§ 230.10 *et seq.*

quate" remedies in a court. The Court of Appeals properly rejected the government's cynical arguments, and this Court should affirm that, once an AJD has been through the administrative appeals process, the recipient may challenge the government's assertion in court. Allowing judicial review will cultivate administrative consistency, provide citizens a means of redress for unlawful agency determinations, and foster public confidence in the fairness of the regulatory regime.

I. Approved Jurisdictional Determinations Are Final Agency Action Under the Administrative Procedure Act.

In construing the APA's language, this Court has emphasized that the "legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140-41 (1967) (citations and footnote omitted).[14]

---

[14] The APA's generous review provisions were also clearly on the Court's mind during the *Sackett* oral argument. Tr. of Oral Arg. at 41, 50, *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062) ("*Sackett* Oral Arg. Tr.") (Breyer, J.) ("for 75 years the courts have interpreted statutes with an eye towards permitting judicial review, not the opposite...the government here is fighting 75 years of practice ").

This Court's cases have consistently held that agency action is final if it is definitive and has a direct, immediate, and practical impact on the parties. See *Frozen Food Express* v. *United States*, 351 U.S. 40, 44 (1956) (agency action is final if it "has an immediate and practical impact"); *Abbott Labs.*, 387 U.S. at 151-52 (agency action is reviewable if it is "definitive" and [has] a "direct and immediate effect on the day-to-day business of [the complaining parties]."); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239 (1980) (quoting *Abbott Labs.*); *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (agency action reviewable if it is action "by which 'rights or obligations have been determined' or from which 'legal consequences will flow'").

The government argues that agency action is not reviewable unless it *directs* a citizen to take action. Pet'r's Br. at 17, 26, 27, 31, 42, 43, 44. But the key question from the cases is whether the challenged action has a practical effect on day-to-day operations or becomes the basis for ordering the recipient's affairs. Certainly government action that directs a particular recipient to take action is reviewable under the standard, see *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012) (holding Compliance Order directing respondent to "restore" land is reviewable), but, contrary to the government's argument, that is not the only kind of action that warrants APA review.

A. Agency Action Is Final If It Is Definitive and Has a Direct, Immediate, and Practical Impact.

APA caselaw demonstrates that an AJD's immediate practical effects are more than sufficient to satisfy APA judicial review requirements.[15] In *Frozen Food Express*, motor carriers sought judicial review of an Interstate Commerce Commission ("ICC") determination that certain commodities did not qualify for an agricultural exemption. 351 U.S. at 41. Similar to jurisdictional determinations, the order "would have effect only if and when a particular action was brought against a particular carrier." *Abbott Labs.*, 387 U.S. at 150 (summarizing the facts in *Frozen Food Express*). Yet, the Court noted:

> The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact ..[It] warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties ..The determination is not therefore abstract, theoretical or academic ..[It] is, indeed, the basis for carriers in ordering and arranging their affairs.

---

[15] Courts agree and the government concedes that AJDs are the consummation of the agency's decisionmaking process. *Belle Co., L.L.C.* v. *U.S. Army Corps of Eng'rs*, 761 F.3d 383, 388 (5th Cir. 2014); *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008); Pet'r's Br. at 26. No further discussion regarding this issue, therefore, is necessary.

Frozen Food Express, 351 U.S. at 43-44. An AJD carries a similar warning, and, like the ICC order, becomes the basis for recipients in ordering their affairs. See also *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 418 (1942) (people "conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails").

Likewise, in *Abbott Labs.*, the Commissioner of Food and Drugs issued regulations requiring pharmaceutical companies to put generic names on labels and advertisements describing the names and ingredients of their drugs. The government argued that although the requirements were issued as regulations, they were not reviewable because the rules could only be enforced by civil or criminal actions brought by the Attorney General. But the Court held the rules were nonetheless reviewable because "they have the status of law and violations of them carry heavy criminal and civil sanctions." 387 U.S. at 152. Therefore, they created a "dilemma" that had a "direct effect on the day-to-day business" of the drug companies. *Id.* "Either they must comply with the requirement and incur the costs or they must follow their present course and risk prosecution." *Id.* (internal quotation marks omitted).

The recipient of an erroneous AJD faces a similar dilemma: either acquiesce in a jurisdictional determination she believes is incorrect (and forgo use of lands erroneously characterized as "waters of the United States" or incur the costs of applying for a permit she should not be required to obtain), or initi-

ate development and risk facing "serious criminal and civil penalties." *Id.* at 153. The Court saw judicial review as a solution to the dilemma in *Abbott Labs.*; similar reasoning applies here.

More recently, the Court held in *Bennett* that a Fish and Wildlife Service Biological Opinion ("BO" or "Opinion") concerning the operation of a Bureau of Reclamation dam was final agency action within the meaning of the APA. 520 U.S. 154 (1997). The government argued that the BO was not final agency action because the Bureau was "not legally obligated" to adopt the "reasonable and prudent alternatives" identified by the BO. *Id.* at 177 (quoting Br. for Resp'ts at 33). Importantly, the *Bennett* Court recognized that, while the Opinion "theoretically serves an 'advisory function' in reality it has a powerful coercive effect." *Id.* at 169 (internal citation omitted). "The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees) [risking] substantial civil and criminal penalties, including imprisonment." *Id.* at 170. Here, as in *Bennett*, while the Hawkes Co. is technically free to disregard the AJD and proceed with its proposed action, it does so at its own peril, risking substantial civil and criminal penalties for an unauthorized discharge.

The government tries to avoid the power of these seminal cases by analogizing AJDs to "informal agency opinion letters and other statements." Pet'r's Br. at 33. First, as discussed above, there is nothing "informal" about AJDs. They are the product of a

carefully prescribed site-specific investigation the results of which are reported in a prescribed format on a prescribed form. And they are not mere opinions; they bind the agencies.[16] But, more importantly, the form of agency action is not dispositive. Even an "informal decision" by an agency may be subject to judicial review. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) (recognizing a letter, written by an EPA Regional Administrator notifying PPG that their waste-heat boilers are subject to the Clean Air Act, is reviewable under the APA).[17] Thus, any implication by Petitioner that informal agency action is *never* subject to judicial review is false. [18]

---

[16] Indeed, AJDs are far more formal, and require far more investigation, than the Compliance Order held reviewable in *Sackett* which was issued "on the basis of any information available" to EPA. 33 U.S.C. § 1319(a).

[17] Justice Stevens explained that the "informal advice" was reviewable because, among other reasons, "PPG would have to risk sizeable penalties in order to challenge EPA's determination in enforcement proceedings." *Harrison*, 446 U.S. at 603-04 (Stevens, J., dissenting on other grounds).

[18] In a similar vein, the government argues that AJDs are not reviewable because they are not self-executing and lack independent legal effect. But the Court has repeatedly rejected these attempts to bypass the APA. *Sackett*, 132 S. Ct. at 1373 ("the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."); *Port of Bos. Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 (1970) (rejecting the "argument that the order lacked finality because it had no independent effect on anyone").

B. Approved Jurisdictional Determinations Have the Requisite Effects to Be Final Agency Action.

The government tries to downplay the importance of AJDs. It characterizes them as a "salutary administrative practice" voluntarily undertaken for the benefit of the public – nothing more than the Corps's "non-binding view" of CWA jurisdiction at a particular location. Pet'r's Br. at 20, 23, 41. But this is just wrong. An AJD *is* binding. See *supra* note 11 and accompanying text; RGL 08-02 at 2 (an AJD "can be used and relied on if a CWA citizen's lawsuit is brought challenging the legitimacy of that JD or its determinations."). The government having bound itself to their determination, expects that the "affected party" will rely on it. As the government explains in its brief, an AJD provides "the property owner more information on which to base its own assessment of its statutory obligations" and therefore "may influence the landowner's choice among alternative courses of conduct." Pet'r's Br. at 36-37. And, as described below, it does. Indeed, why would Congress appropriate and the Corps spend millions of taxpayer dollars on completing AJDs if they were as ineffectual as the government now claims?[19]

---

[19] *Supra* note 12.

AJDs Affect Site Development Plans. In keeping with the Section 404 policy to avoid and minimize wetland impacts, the "affected party" typically uses the AJD to design a site plan that maximizes avoidance. Exhibit 2 demonstrates how this works. Exhibit 2-A depicts the location of 14 discrete wetland areas across a 375-acre site in the southeastern United States. The wetlands range in size from 0.11 acre to 2.7 acres. Exhibit 2-B shows that the development plan for the site was strongly influenced by the jurisdictional map. Thus, the street in the north end terminates in a cul-de-sac to avoid wetland A; the street in the northeast side curves around wetlands B and D; a gap in development appears in the center of the map to avoid wetlands G and N; and the building lots to the southwest are arranged to avoid impacts to wetlands H, I, J, K, L, and M.

Exhibit 2-A

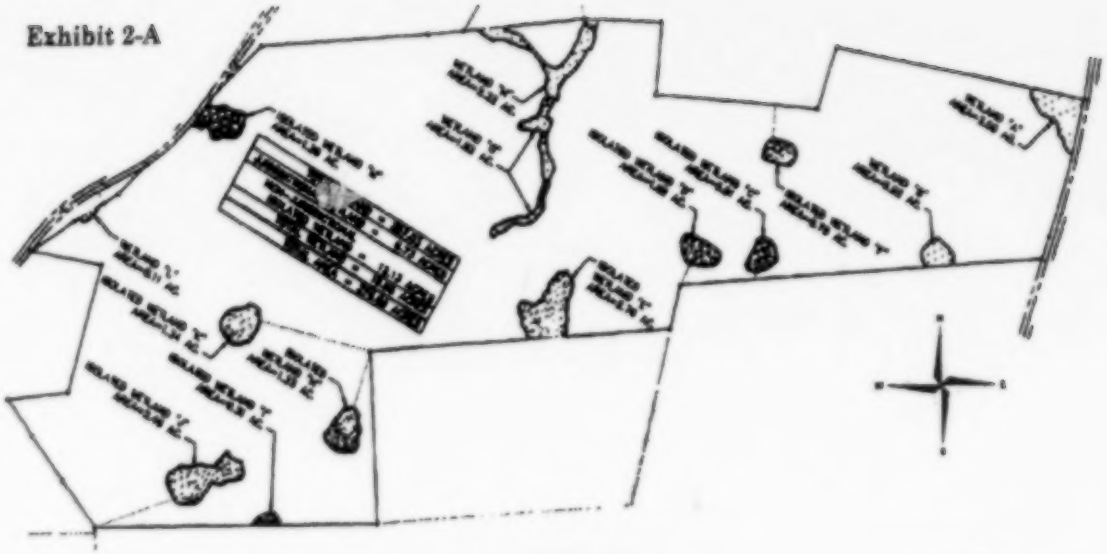
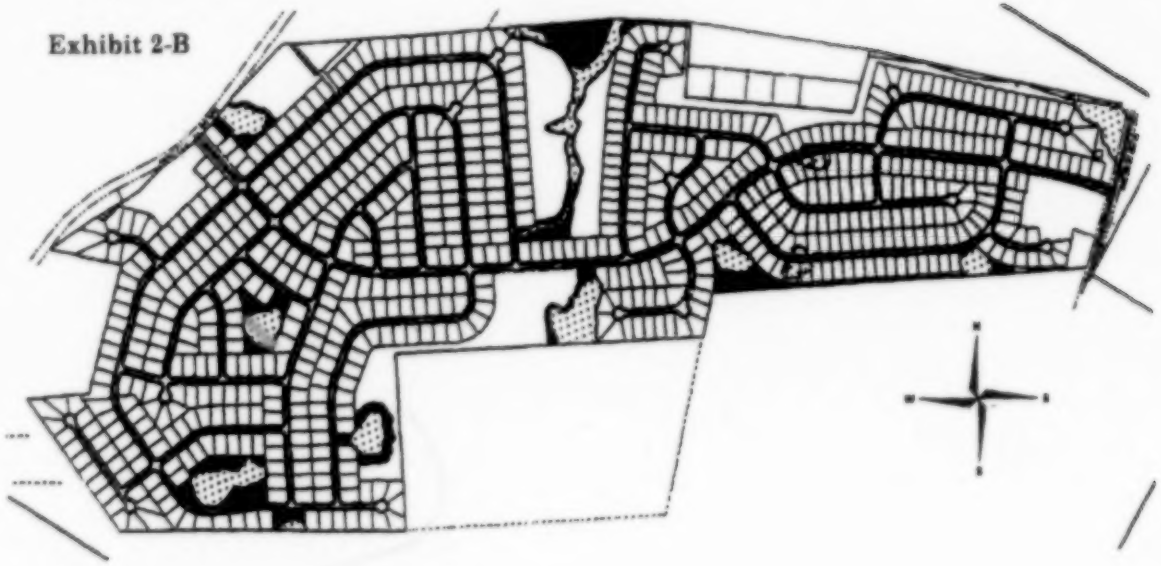


Exhibit 2-B



AJDs Affect Property Value. AJDs can tangibly affect a person's day-to-day operations outside of the development setting as well. In one case of which *Amici* are aware, the appraisal value of mortgaged land in the Mid-Atlantic was reduced from over $32 million to about $1 million when the Corps determined that the land contained "waters of the United States," and the lender demanded additional collateral. AJDs may impact property values, thereby affecting tax assessments and even in some cases triggering U.S. Securities and Exchange Commission reporting requirements under 17 C.F.R. § 229.103(5). See, *e.g.*, *Bergen Cnty. Assocs.* v. *Borough of E. Rutherford*, 12 N.J. Tax 399, 408, 411, 418 (N.J. Tax Ct. 1992) (land that had been valued at $47,500,000 reduced to $2,029,800 based on determination that land was jurisdictional). Indeed, the potential for these kinds of effects is borne out by a declaration prepared in response to the government's brief and discussed more fully *infra*. Declaration of Professor David L. Sunding, Ph.D. ¶ 7 (attached) ("Sunding Decl.") ("jurisdictional determination[s] that increase the expected cost of development will reduce the property's current market value.").

AJDs Affect State and Local Regulatory Requirements. Other effects abound. In Louisiana, for example, an AJD is a material fact that must be disclosed in real estate transactions. If "any part of the property [has] been determined a wetland by the [Corps]," then the seller must disclose it to the buyer. Louisiana Property Disclosure Document for Residential Real Estate, at 1 of 4 (Rev. 02/01/15); LA.

REV. STAT. ANN. § 9:3198(A)(1) (2013). Some states require AJDs before issuing water quality certifications and "base their fees on the extent of impacts to waters of the United States." Questions & Answers on RGL 08-02, at 8.

State and local agencies in South Carolina rely on Corps jurisdictional determinations in implementing their own programs. For example, the City of Charleston uses the "Corps of Engineers approved wetland delineation line" to calculate minimum lot sizes and to locate required buffers around jurisdictional areas. City of Charleston, Subdivision Concept Plan Submittal Checklist, at 2. Horry County and the City of Beaufort require a verified Corps jurisdictional determination as a condition precedent of plat approval.[20] South Carolina's Department of Health and Environmental Control ("DHEC") relies on AJDs in authorizing stormwater discharges from construction sites. S.C. DHEC, National Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activities, § 2.6.2 (2013). Small changes in the size and location of Corps jurisdiction can affect DHEC permit requirements. See *Deerfield Plantation Phase II B Prop. Owners Ass'n* v. *S.C. DHEC*, 777 S.E. 2d 817 (S.C. 2015). Likewise, in California, local land use agencies use AJDs to assess aquatic features and calculate mitigation requirements under the California Environmental Quality Act. See Newport Ban-

---

[20] Horry Cnty., S.C., Code of Ordinances, ch. 18, art. 2, §§ 3-4(C), 4-1 (2015) and Beaufort, S.C., Unified Development Ordinance, App. at 9-10 (revised Sept. 14, 2012).

ning Ranch, Draft Envtl. Impact Report (Sept. 8, 2011).

AJDs Can Affect Penalties. Especially significant is an AJD's potential effect on civil and criminal penalties when the government brings an enforcement action.[21] 33 U.S.C. § 1319(c)(2). The government says that the civil penalty and criminal provisions do not "assign any particular evidentiary weight to" a jurisdictional determination. Pet'r's Br. at 32. The provisions do, however, emphasize "knowledge" and "good faith efforts to comply" as important factors in determining penalties. 33 U.S.C. §1319 (a), (c). Moreover, the government's brief admits that "[a] landowner's knowledge that the agency believes the CWA applies could be offered as evidence of the owner's knowledge of the CWA's applicability," Pet'r's Br. at 32, and the government acknowledged during oral argument in *Sackett* that courts commonly impose higher penalties based on knowledge: "[I]t is often the case that what district courts will do is impos[e] a greater penalty because it shows greater culpability to continue with the violation after you've been warned." *Sackett* Oral Arg. Tr. at 29.[22] Knowledge is at the crux of the

---

[21] The risk of criminal penalties is not theoretical. See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d 719, 723 (3d Cir. 1993) (three years' imprisonment); *United States* v. *Ellen*, 961 F.2d 462, 464 (4th Cir. 1992) (six months' imprisonment).

[22] See *Borden Ranch P'ship* v. *U.S. Army Corps of Eng'rs*, 261 F.3d 810, 816-819 (9th Cir. 2001) (significant civil penalty for ignoring jurisdictional features on wetland delineation map), *aff'd*, 537 U.S. 99 (2002); *United States* v. *Feinstein Family P'ship*, No. 96-232-CIV-FTM-24(D), 1998 U.S. Dist. LEXIS

penalty provisions. Therefore, one cannot imagine a future enforcement action in which a positive AJD would not be offered as evidence to demonstrate the defendant's knowledge that the CWA applied to his or her property.

AJDs Affect Permit Type and Mitigation Costs. By identifying the limits of jurisdictional waters on a property, an AJD directly affects whether the landowner may qualify for a streamlined general permit, such as a nationwide permit ("NWP"). NWPs are available for certain projects that have "only minimal adverse environmental effects," 33 U.S.C. § 1344(e), and as the Corps has acknowledged "[m]any project proponents will design their projects to comply with the [acreage] limit so that they can qualify for an NWP and receive authorization more quickly than they could through the standard permit process." 65 Fed. Reg. 12,818, 12,821 (Mar. 9, 2000). The more jurisdictional waters on a given parcel of land, the harder it will be for a landowner to qualify for an NWP Therefore, by identifying the extent of jurisdictional areas, an AJD "directly affect[s] the investment and project development choices of those whose activities are subject to the CWA." See *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*,

---

23963, at *29 (M.D. Fla. Oct. 28, 1998) (substantial civil penalty because defendants knowingly disregarded CWA permitting requirements); *United States* v. *Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (violation of cease-and-desist letter justifies substantial civil penalty); *Hanson* v. *United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989) (substantial administrative penalty owing in part to violation of cease-and-desist order).

417 F.3d 1272, 1280 (D.C. Cir. 2005); see also *supra* Exhibits 2-A and 2-B.

Additionally, under Corps regulations, "all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts." 33 C.F.R. § 320.4(r)(2). Although mitigation costs vary widely, mitigation provided through mitigation banks and in-lieu-fee programs ranges from $41,572 to $111,985 per acre of wetlands mitigated, and from $95 to $1,000 per linear foot of stream mitigated. [23] Thus, a legal determination of what constitutes "waters of the United States" will result in both physical and financial costs for the "affected party."

* * *

An AJD is, at once, a legal assertion of authority and a detailed geographical declaration of regulated waters whose consequences cascade throughout all levels of federal, state, and local government. Its influence on future uses of the property is undeniable. As was the case with the labeling requirement in *Abbott Labs.*, the exemption determination in *Frozen Food Express*, and the Biological Opinion in *Bennett*, an AJD can technically be disregarded, but only at the peril of substantial civil and criminal liabilities.

---

[23] U.S. EPA & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule at 40 (May 20, 2015), EPA-HQ-OW-2011-0880-20866.

This is precisely the kind of dilemma Congress sought to alleviate when it built the generous review provisions into the APA.

II. There Is No Other Adequate Remedy in a Court for Approved Jurisdictional Determinations.

The APA establishes that final agency action "for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704. The government contends there are adequate paths to dispute an AJD that incorrectly identifies jurisdictional waters. First, the government suggests that the permitting process itself is "the primary avenue of obtaining judicial review of a jurisdictional determination." Pet'r's Br. at 45. In other words, a landowner who disagrees with the Corps's final determination – *i.e.*, an AJD that has been affirmed through the administrative appeals process, 33 C.F.R. Part 331, Appendix C – should apply for a permit, file an administrative appeal of the permit decision, see 33 C.F.R. Part 331, Appendix A, and then sue on the permit decision and litigate the validity of the AJD through judicial review of the permit. Second, as an alternative remedy, the government proposes that the recipient of an incorrect AJD initiate development without a permit, trigger an enforcement action and then litigate jurisdiction as a defense in an enforcement action. See Pet'r's Br. at 50.

To accept the government's argument, the Court would have to redefine the word "adequate."

In truth, there is no other adequate remedy in a court. A landowner should not have to go through an entire permit process to demonstrate that she is not subject to the permit requirement.[24] Moreover, the permit application process is not a vehicle to amend jurisdiction. It is designed to determine whether a permit can be issued and to define the terms and conditions of the permit, not whether jurisdiction exists in the first place. Nor is the government's second proposed remedy any better. Forcing a citizen to risk criminal and civil liability in order to test the validity of a questionable government action is hypocritical and irresponsible. Congress, by enacting the APA, plainly afforded a better way.

A. Judicial Review of a Permit Is Not an Adequate Remedy for an Unlawful Approved Jurisdictional Determination.

The government's first alternative remedy – pursuing a permit and then challenging the permit in court – assumes that everybody who seeks an AJD wants to develop their property immediately. Just go ahead, the government suggests, apply for a permit and see what happens. If the recipient can work with the permit, then nobody will need to address the jurisdictional issue. Aside from the bland indifference to the substantial costs and time associated

---

[24] It "seems very strange for a party to apply for a permit on the ground that they don't need a permit at all." *Sackett* Oral Arg. Tr. at 14 (Alito, J.).

with the permitting process, this notion makes no sense for a person who seeks an AJD, for example, before purchasing a piece of property. See, *e.g.*, *Dep't of Transp.* v. *La Salle Nat'l Bank*, 623 N.E.2d 390, 399 (Ill. App. Ct. 1993) ("[A] reasonably prudent and knowledgeable buyer would be 'crazy' not to investigate for the presence of jurisdictional wetlands."). Consigning these individuals to the permit process and then challenging the result is no remedy.

Moreover, the permitting process is not a vehicle to review or amend an AJD. The purpose of the permitting process is to determine whether a permit can be issued and to define the terms and conditions of the permit. To be clear, an AJD, because it determines the amount and location of jurisdictional features, will strongly influence those permit terms and conditions. But the process of obtaining an AJD and the process of obtaining a permit are two separate and discrete functions. See 33 C.F.R. pt. 325; see also 33 C.F.R. pt. 331, Apps. A, C (two separate administrative appeals processes, as well). Further, an AJD, once finalized, is binding on the government. 1989 MOA at 1; RGL 08-02 at 2. It cannot be changed – through the permit process or anywhere else. Rather, if the Corps has issued an AJD, that document becomes a polestar for the permit process. Thus, rather than providing a remedy for an erroneous AJD, the permit process is just an expensive and unproductive obstacle to judicial review.

The government spends four pages of its brief trying to convince the Court that the 404 permit process

is a walk in the park and to discredit a study[25] cited by the Court in *Rapanos*, 547 U.S. at 721 (plurality op.), which showed just how difficult it is to go through that process. Pet'r's Br. at 46-50. Attached to this brief as an Appendix is a declaration by the author of that study, David L. Sunding, Professor and Thomas J. Graff Chair of Environmental and Resource Economics, University of California, Berkeley, responding briefly to the government's allegations. Paragraph four of the declaration states that the study showed "it takes the typical project developer over 788 days to prepare and negotiate an individual permit, and that the typical nationwide permit takes 313 days to obtain." Sunding Decl. ¶ 4. The government criticizes the study for including "the time the applicant takes to prepare the application," Pet'r's Br. at 47 n. 10, and instead tries to focus the Court's attention on the amount of time the Corps takes to process the application after it deems the application "complete."

But this is a red herring. The key issue under the APA is whether the *recipient* has an adequate remedy in court, and surely the amount of time and money he or she must devote to the permit process is relevant to the "adequacy" of this proposed remedy (not the amount of time the Corps spends). Here, for example, the Corps told the Hawkes Co. that it would require nine additional studies, including expert sci-

---

[25] David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59 (2002) ("Sunding Article").

entific and biological assessments, before the application would be deemed complete. Pet'r's J.A. at 33-34.

The government also claims it was "particularly inappropriate" for the Court to rely on Professor Sunding's cost figures because they were skewed by larger projects driving up the "average cost." Pet'r's Br. at 49 & n. 12. Professor Sunding's declaration explains how the sample was assembled, and, further, that "the projects in [the] sample are not atypically large or small." Sunding Decl. ¶ 6. The government also says the *median* cost for an individual permit was $155,000, "much lower" than the *mean* cost cited in *Rapanos*.[26] Pet'r's Br. at 49 n. 12. Perhaps $155,000 seems trivial to the Federal government, but to an individual permit applicant this *is* surely a significant cost. And Professor Sunding's declaration shows that the costs are far higher today. "[A]pplying the Consumer Price Index (CPI) inflation rate to the cost figures reported in my 2002 article the typical individual permit cost $386,392 to obtain, and the typical nationwide permit cost $41,137." Sunding Decl. ¶ 3.

Finally, judicial review, via the permitting process, is only available after exhausting all administrative remedies. According to Corps regulations at 33 C.F.R. Part 331, a permit appeal is supposed to

---

[26] The "average applicant for an individual permit spends $271,596 in completing the process, and the average applicant for a nationwide permit spends $28,915 – not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 721 (plurality op.) (citing Sunding Article).

take no more than 150 days, but the Corps's division websites show that, from 1999 to the present, nationwide, on average, permit appeals decided on the merits took 306 days.[27]

In sum, applying for a permit is not an other adequate remedy in a court under the APA. The government's "remedy" forces the "affected party" to apply and perhaps receive a permit it never needed in the first place and then to decline the permit to challenge jurisdiction. This roundabout process is unreasonable. The "affected party" should have the opportunity in the first instance to demonstrate the area in question is not "navigable waters."

B. Judicial Review in the Context of an Enforcement Action Is Not an Adequate Remedy for an Unlawful Approved Jurisdictional Determination.

As an additional "remedy," the government makes the astonishing suggestion that a citizen, if she is "sufficiently confident" that a "relevant site does not contain 'waters of the United States,'" may initiate development and then challenge jurisdiction once an enforcement action is brought. Pet'r's Br. at 16. There is a lot wrong with this argument.

First, it assumes that the government will initiate an enforcement action that allows for judicial re-

---

[27] See, *e.g.*, USACE, South Atlantic Division, Table of Appeals, http://www.sad.usace.army.mil/Missions/Regulatory/RegulatoryAppeals/TableofAppeals.aspx.

view. Whether it does so is entirely within the government's discretion, however. The government knows, after *Sackett*, that a Compliance Order will be subject to judicial review at the behest of the recipient. But the government has numerous other administrative enforcement tools, and our post-*Sackett* experience suggests they will choose those that elude judicial review. In *Duarte Nursery*, 17 F. Supp. at 1020, for example, the government issued a cease-and-desist letter to a farmer in the central valley of California and then claimed that the letter "was merely a suggestion, not a command. No one forced Duarte to stop working his wheat field That was simply his own choice." Robin Abcarian, *This case is enough to furrow a farmer's brow*, LOS ANGELES TIMES, Jan. 15, 2016, at B2.; see also Mem. of Points & Authorities in Supp. of Fed. Def.'s Mot. to Dismiss Compl. at 8-11, *Duarte Nursery, Inc.* v. *U.S. Army Corps of Eng'rs*, 17 F. Supp. 3d 1013 (E.D. Cal. 2014) (No. 2:13-cv-02095-KJM-AC). In the same vein, *amici* have seen more proposed Administrative Orders on Consent in which the government claims illegal discharges are occurring in "navigable waters" and then offers to settle administratively on the condition that the respondent agree not to challenge jurisdiction in court. In short, enforcement is a "remedy" only if the government chooses to allow it to be a remedy.

Moreover, given the government's theory that CWA violations continue each day the fill remains in place, the government retains all power and control in determining when and where to "drop the ham-

mer." *Sackett*, 132 S. Ct. at 1372. Once the "affected party" disturbs the ground, the threat of government enforcement will continue indefinitely.

Finally, allowing oneself to become the defendant in an enforcement case entails other substantial risks. An enforcement action for violation of environmental laws will likely tarnish the reputation of the defendant, and may as the Court stated in *Abbott Labs.* harm the recipient "severely and unnecessarily." 387 U.S. at 153. As the Court observed in *Sackett*, "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review – even judicial review of the question whether the regulated party is within the [Corps's] jurisdiction." 132 S. Ct. at 1374. It is astonishing, then, that the government would suggest that an individual should be required to trigger an enforcement action carrying very substantial penalties in order to test the validity of the government's jurisdictional claim. We thought *Ex parte Young* laid that poor idea to rest more than a century ago. 209 U.S. 123, 130, 142 (1908) (holding the statute denied due process because any challenger would be subject to severe penalties and "ruinous consequences").

* * *

In sum, without APA judicial review, the "affected party" faces three equally onerous choices – to avoid

using the broad swaths of land the Corps has incorrectly determined are jurisdictional, to seek a permit, or to proceed without a permit and later face very large fines. This is exactly the kind of situation the APA was enacted to address.

For sound policy reasons that animate the APA, the affected parties should have the opportunity to challenge in court jurisdictional determinations they believe are incorrect. The government suggests that allowing judicial review would "strain the Corps' limited resources" and the "Corps might reconsider the practice, or at least revisit its willingness to provide an [AJD] to anyone who requests it." Pet'r's Br. at 24. The government's threat, however, is based on the false premise that AJD recipients will challenge an overwhelming number of jurisdictional determinations. But, except in the most egregious cases, most people do not want to go to court. They too have limited resources and time, and would rather spend those resources on productive activity, be it land development, land sale, or fixing an appraisal for tax purposes. The government's concern is overblown,[28] and in no way alters the reviewability of AJDs under the APA.

Furthermore, "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 132 S. Ct. at 1374. The point of judicial review is to foster an

---

[28] The government made the same argument in *Sackett*, but we have not seen a flood of lawsuits challenging Compliance Orders.

agency commitment to consistent adherence to applicable rules, and to allow citizens to hold them accountable when they stray, even if it means, at times, the agency must expend additional resources. This is the promise of the APA. Congress knew unreviewable authority would breed extravagant claims of jurisdiction, and "would in effect be blank checks drawn to the credit of some administrative officer or board." S. REP. NO. 752 at 26 (1945). Thus it enacted APA Section 704 to give citizens the right to ensure their government would be "put to the test." *Sackett* Oral Arg. Tr. at 54 (Roberts, J.).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ANDREW J. TURNER
KARMA B. BROWN
KRISTY A. N. BULLEIT
Of Counsel
UTILITY WATER ACT GROUP
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
(202) 955-1500

VIRGINIA S. ALBRECHT
Counsel of Record
DEIDRE G. DUNCAN
BRIAN R. LEVEY
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
valbrecht@hunton.com
(202) 955-1500

March 2, 2016

Counsel for Amici Curiae

APPENDIX

APPENDIX

No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

Declaration of Professor David L. Sunding, Ph.D.

I, David L. Sunding, declare as follows:

1. I am currently a professor in the Department of Agricultural & Resource Economics at the University of California, Berkeley, and hold the Thomas J. Graff Chair in Environmental and Resource Economics. In addition to my position at Berkeley, I am a principal in the litigation practice of The Brattle Group in the San Francisco office. Prior to my current positions, I served as a senior economist on President Clinton's Council of Economic Advisors. I have also served on panels of the National Research

Council and the U.S. Environmental Protection Agency Science Advisory Board.

2. In 2002, I published *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NATURAL RESOURCES J. 59 (2002), that analyzed the costs to obtain a discharge permit issued under Section 404 of the Clean Water Act. This article was cited by the Supreme Court in *Rapanos* v. *United States*, 547 U.S. 715 (2006). I calculated the typical out-of-pocket expense incurred by applicants. These costs result from the need to conduct scientific investigations, negotiate with the U.S. Army Corps of Engineers over the conditions of the permit, and redesign the proposed project based on the Corps' final decision.

3. The data collection and analysis was performed in 1999. Translating my findings to 2015 dollars, I concluded that the typical individual permit cost $386,392 to obtain, and the typical nationwide permit cost $41,137. These figures do not include the cost of mitigation and were obtained by applying the Consumer Price Index (CPI) inflation rate to the cost figures reported in my 2002 article.

4. In my article, I also concluded that it takes the typical project developer 788 days to prepare and negotiate an individual permit, and that the typical nationwide permit takes 313 days to obtain. These times are measured from the date at which the applicant begins preparing the permit application, and not merely the amount of time that the Corps takes

to render a decision once the application is deemed to be complete.

5. The data analyzed to reach these conclusions resulted from a detailed examination of 103 individual and nationwide permit applications. I obtained a list of public sector projects from the National Association of Counties and a list of private sector projects through phone interviews with developers and wetlands consultants.

6. Summary statistics from the resulting dataset indicate that the sample was representative of the entire population of Section 404 permits in important respects. The data in the sample come from a roughly even mix of private and public applicants (52 percent public agency applicants and 48 percent private). The projects included in the sample reflect the wide range of activities authorized by Section 404 permits: school construction, quarry expansion, sediment containment, home building, street improvements, and flood control. The distribution of the projects in the sample according to acres impacted and total project acreage is also representative of national averages: the average project size in my sample is 1.95 acres and the average amount of wetland acres impacted is 0.23. Thus, the projects in my sample are not atypically large or small.

7 Mainstream microeconomic theory tells us that in equilibrium, the market value of land equals the capitalized value of the future income stream received by the property owner. In cases where the land has potential for development, the anticipated

costs of development will affect the property's current market value. Thus, actions such as a jurisdictional determination that increase the expected cost of development will reduce the property's current market value. In this sense, a jurisdictional determination by the Corps has an immediate economic consequence, even if the proposed development may occur years in the future.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on February 11, 2016.

/s/ David L. Sunding

David L. Sunding, Ph.D.